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**IN THE
COURT OF APPEALS OF INDIANA**

AHMAD FOSTER,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 49A05-0607-PC-357
)	
STATE OF INDIANA,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Master Commissioner
Cause No. 49G04-9103-PC-31763

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ahmad Foster appeals the denial of his petition for post-conviction relief that disputed his convictions for felony murder,¹ auto theft,² criminal recklessness,³ and carrying a handgun without a license.⁴ He raises the following restated issues:

- I. Whether Foster was entitled to retroactive application of caselaw that arose after his direct appeal, defining when pre-*Miranda* warning interrogation may corrupt a defendant's post-*Miranda* statements; and, if so, whether his inculpatory statements were corrupted such that extraordinary circumstances render them inadmissible.
- II. Whether Foster was denied effective assistance of trial counsel when counsel did not seek suppression of Foster's statements and fingerprints.
- III. Whether Foster was denied effective assistance of appellate counsel for not challenging the trial court's use of certain aggravating circumstances.
- IV. Whether the prosecutor committed a *Brady* violation by not producing exculpatory evidence or impeachable evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts set out in Foster's direct appeal are as follows:

At approximately 12:50 p.m., on December 1, 1990, Timothy Smeehuyzen was driving to the Hoosier Dome in Indianapolis, Indiana, when he noticed two people engaged in a struggle on the southwest corner of 60th Street and College Avenue. Smeehuyzen observed Foster with a handgun attempting to take the purse of an elderly woman, Mildred Stanfield. Foster raised the gun and shot Stanfield in the chest. When Stanfield began to slump and fall to the ground, Foster took her purse and fled. Smeehuyzen quickly turned his car around to pursue Foster, and Foster shot at Smeehuyzen. Smeehuyzen continued his pursuit and observed Foster get into the

¹ See IC 35-42-1-1.

² See IC 35-43-4-2.5.

³ See IC 35-42-2-2.

⁴ See IC 35-47-2-1.

passenger side of a late model Oldsmobile Calais. As the chase continued, Foster leaned out the passenger side of the car and again pointed his gun at Smeehuyzen. Smeehuyzen eventually lost sight of the vehicle.

At approximately 12:53 p.m., police officer James Fitzpatrick of the Indianapolis Police Department received a radio dispatch reporting “a purse grabbed with injury” at 60th and College. Record, p. 1038. Fitzpatrick then received a description of the vehicle in which Foster had fled and learned that Smeehuyzen was in pursuit of Foster. As Fitzpatrick drove through the course of the chase, he observed several items laying on the street and sidewalk, including a church organist’s book and a black purse. Fitzpatrick directed a crime lab technician to the area to recover the items for evidence.

During the evening hours of that same day, the Calais used as the getaway vehicle was located, abandoned, on the northwest corner of 33rd and Carrollton. The car had been stolen just prior to the shooting and robbery. The owner of the car noted that the right rear vent window was broken out, the molding around the window had been pried, and the steering column was broken. The owner also noted that a baby car seat and Mobil Oil credit card were missing from the vehicle. The broken car window was covered by plastic held in place by tape, and several latent fingerprints were discovered on the tape.

On December 29, 1990, at approximately 3:30 a.m., fingerprints on the tape from the car window were identified as belonging to Foster’s brother, William Foster. After ascertaining William’s address, police prepared a probable cause affidavit and a search warrant for his residence. The affidavit and warrant were taken to the residence of (the late) Judge A. Toni Cordingly, who signed the warrant authorizing the search. At approximately 10:00 a.m. that same morning, the police went to William’s residence at 3046 North College Avenue to execute the search warrant. Foster was found in bed, and under the mattress was a .25 caliber handgun. Suspected narcotics were discovered on top of a dresser and table in the same room. Foster’s brother William was found in another bedroom, and the .22 caliber handgun that had been used to shoot Stanfield was found in that room. During the course of the search, the boys’ mother, Thelma Foster, arrived at the residence.

Foster and his brother William were transported to the police station for questioning. Their mother was transported to the police station separately, and their father was later picked up at his workplace and brought to the police station. With the presence and agreement of his parents, Foster waived his rights and gave a recorded statement to police in which he admitted shooting Stanfield. A latent fingerprint on Stanfield’s purse was identified later as belonging to Foster.

Foster was fourteen years old when Mildred Stanfield was murdered. On motion by the State, juvenile jurisdiction over the cause was waived to adult court. Prior to trial, Foster moved to suppress the evidence seized during the search of the Foster residence and his statements to police in which he confessed to shooting and robbing Stanfield. The trial court granted Foster's motions with regard to any pre-rights advisement and waiver statements, but denied Foster's motions in all other respects. After a trial by jury, Foster was convicted of felony murder, robbery, auto theft, carrying a handgun without a license, and criminal recklessness. The robbery count was merged with the felony murder count, and Foster received a sentence of fifty-three years.

Foster was sentenced as follows: felony murder, fifty years; auto theft, three years concurrent; carrying a handgun without a license, one year concurrent; criminal recklessness, three years consecutive.

Foster v. State, 633 N.E.2d 337, 340-41 (Ind. Ct. App. 1994) (footnote omitted).

On direct appeal, Foster challenged the trial court's denial of his motion to suppress his statements to police because he was: 1) illegally detained; 2) not provided a meaningful opportunity to consult with his parents; and 3) interrogated in a coercive manner. This court found no error and affirmed his convictions. Our Supreme Court later denied transfer.

Foster filed an amended Petition for Post-Conviction Relief, which the trial court denied following a hearing. Foster now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings are civil proceedings, and a petitioner must establish his claims by a preponderance of the evidence. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003). Because Foster is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that

reached by the post-conviction court. *Id.* Stated differently, Foster must persuade this court that there is no way the post-conviction court could have reached its decision. *Id.*

Our Supreme Court has stated that post-conviction proceedings do not grant a petitioner a “super-appeal” but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing P-C.R. 1(1)).

If an issue was known and available but not raised on direct appeal, it is waived. If it is raised on appeal but decided adversely, it is [*res judicata*]. If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post-conviction proceeding. A claim of ineffective assistance of appellate counsel is also an appropriate issue for a post-conviction proceeding. As a general rule, however, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and [*res judicata*].

Id. (citations omitted).

I. Retroactive Application of *Missouri v. Seibert*⁵

Foster first claims that the post-conviction court erred in concluding that he was not entitled to the retroactive application of *Missouri v. Seibert* and the United States Supreme Court’s clarification of when a defendant’s post-*Miranda* statements are inadmissible due to pre-*Miranda* interrogation. To reverse the post-conviction court, this Court must find that *Seibert* deserves retroactive application to suppress Foster’s post-*Miranda* confession and that extraordinary circumstances exist to overcome *res judicata*.

The post-conviction court denied Foster’s *Seibert* claim on a number of grounds. First, it held that Foster had already challenged the admissibility of his confession on direct appeal, *Foster*, 633 N.E.2d at 349 (citing *Oregon v. Elstad*, 470 U.S. 298, 310-15

⁵ *Missouri v. Seibert*, 542 U.S. 600 (2004).

(1985) (procedures utilized by detective in obtaining confession were appropriate), and was denied relief; as such, the issue was *res judicata*. *Appellant's App.* at 46. Second, it found that Foster offered no evidence other than the bare assertion that *Seibert* applied retroactively. *Id.* at 45. Third, the post-conviction court found that there were no extraordinary circumstances warranting the court to disregard *res judicata* because, beyond Foster's confession, eyewitness testimony, and evidence of ballistics and fingerprints also supported his conviction. *Id.* at 46.

Foster directs us to *Huffman v. State*, 643 N.E.2d 899, 901 (Ind. 1994), where our Supreme Court affirmed the judgment of the post-conviction court that, based on new caselaw, the jury instruction on defendant's burden of proving the defense of intoxication constituted fundamental error, notwithstanding the Supreme Court's decision that the instruction was adequate in *Huffman's* direct appeal. The Court found that the jury instruction confused which party maintains the constant burden of persuasion and that it must revisit its decision in *Huffman's* direct appeal. *Id.*

"A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work manifest injustice.'" *State v. Lewis*, 543 N.E.2d 1116, 1118 (Ind. 1989) (quoting *Christianson v. Colt Industries Operating Corp.* 486 U.S. 800, 817 (1988)). Finality and fairness are both important goals. When faced with an apparent conflict between them, this Court unhesitatingly chooses the latter.

Id. at 901.

Here, Foster claims that *Siebert* is new caselaw that deserves retroactive application to his confession. In *Siebert*, the United States Supreme Court ruled that a

police protocol to intentionally withhold *Miranda*⁶ warnings until after an incriminating statement has been rendered, caused post-*Miranda* statements to be inadmissible. 542 U.S. at 604. There, during the defendant's post-*Miranda* questioning, the interrogating officer confronted the defendant with his pre-*Miranda* statements. *Id.* at 605. The officer also openly admitted he employed the "question first" tactic. *Id.* at 616 n.6. The court held that all of the defendant's incriminating statements were inadmissible. In its decision, the Court distinguished its previous ruling in *Oregon v. Elstad*, 470 U.S. 298 (1985) regarding the admission of pre-*Miranda* statements. In *Elstad*, the Court had held that the conversation with the defendant at his home, before returning to the station for *Miranda* warnings and more questioning, indicated a good faith oversight. *Seibert*, 542 U.S. at 614 (citing *Elstad*, 470 U.S. at 301, 314-15). The *Seibert* court set forth factors to consider when deciding whether *Miranda* warnings given midway through an interrogation are still effective. *Id.* at 615. Specifically, a court should look at: 1) the completeness and detail of the questions and answers in the first round of interrogation; 2) the overlapping content of the two statements; 3) the timing and setting of the first and second; and 4) the degree to which the interrogator's questions treated the second round as continuous with the first. *Id.*

Here, the record is void of any evidence suggesting improper police procedure. Foster originally was brought in as a witness to a possible shooting. After questioning his brother and confirming his story with Foster, the police waited until Foster had an opportunity to speak with his parents before obtaining his statement. Foster was given ample opportunity to discuss the matter privately with his parents, to have an attorney

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

present, and to remain silent. The video taped interview between Foster, his parents, and the interviewing detective did not show that Foster's previous statement corrupted his responses or that the detective bolstered Foster's confession. At no time did the officer elicit Foster's responses by relating to him what had been previously discussed. Foster admitted that his statements were voluntary and made in the hopes he would receive less punishment. His fingerprints were also an inevitable product of the police investigation. Further, beyond Foster's confession, there was eyewitness testimony, evidence of ballistics and his fingerprints, to support his conviction. Foster has failed to present extraordinary circumstances that overcome *res judicata*.⁷ As such, we find our decision in Foster's direct appeal to be the law of the case.

II. Parental Advisement

Next, Foster claims that he received ineffective assistance of counsel⁸ because counsel did not object to Foster's fingerprint identification and confession following Foster's consultation with his stepfather. He claims that because he was only fourteen at the time of questioning, pursuant to IC 31-32-5-1,⁹ he could only waive his rights through "meaningful consultation" with a custodial parent, if that parent has no interest adverse to him. Here, Foster consulted with his stepfather, who was not his custodial parent and was the father of the original suspect. Foster claims that his counsel's failure to object to

⁷ As a result, our decision does not reach the issue whether *Siebert* may be retroactively applied.

⁸ Foster claims that both his trial and appellant counsel failed to raise this issue. Since the review of ineffective assistance of counsel is the same for both trial and appellant counsel, and since Foster had the same counsel for both his trial and his appeal, we review the issue whether Foster's "counsel" was ineffective.

⁹ At the time of Foster's sentence, the language in today's IC 31-32-5-1 appeared in IC 31-6-7-3. IC 3-6-7-3 was repealed and recodified in 1995.

his confession and finger print identification rendered counsel's representation ineffective.

The post-conviction court held that Foster's trial counsel was not ineffective because Foster had ample opportunity to have "meaningful consultation" with his mother, his custodial parent, and that Foster failed to establish how the stepfather overrode the mother's independent ability to provide "meaningful consultation." Further, it was clear from Foster's mother's testimony that his stepfather loved and cared for each son in the same way, and there was no evidence to show Foster's stepfather had an adverse interest to Foster. *Appellant's App.* at 42.

In order for Foster to establish that he received ineffective assistance of trial counsel he must show that: 1) his trial counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) there is a reasonable probability that the result of the proceeding would have been different had counsel been adequate. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). Before we begin our review, we start with a strong presumption that counsel's performance was adequate. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002).

Foster claims that his counsel should have objected to his stepfather's advice as "meaningful consultation." First, a juvenile defendant is required by statute to receive "meaningful consultation" from a parent or parents before he can make a knowing and voluntary waiver of his constitutional rights. *Brown v. State*, 751 N.E.2d 664, 670 (Ind.

2001). Indiana statutory law provides that a valid waiver of a juvenile's rights must include approval:

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver

IC 31-32-5-1.

This Court, on direct appeal, ruled that the statutory requirements had been satisfied. *Foster*, 633 N.E.2d at 348. Our court stated that Foster was able to wait with his mother until "the boys' father" arrived. *Id.* The rights were waived after Foster spoke with his family for forty-five minutes. *Id.* Our court held that Foster was not only afforded meaningful consultation, but actual consultation transpired. *Id.*

The issue now before us is whether, based on prevailing professional norms, Foster's counsel should have known the relationship of Foster and his stepfather, and whether his failure to object constituted ineffective assistance of counsel. For the same reasons as mentioned by the post-conviction court, we find that Foster was not denied effective assistance of counsel: 1) there was nothing to indicate a familial conflict of interest; 2) mother testified that the family has been together for years and that Foster's stepfather treated the boys equally; and 3) Foster did not establish how the stepfather's consent invalidated the mother's consent.

III. Sentence

Foster claims that he received ineffective assistance of appellate counsel for failing to challenge the trial court's determination of aggravating and mitigating circumstances. Specifically, Foster claims that the trial court failed to consider his age, fourteen, as a mitigator, and improperly relied on the following aggravators: 1) that the risk of Foster committing another offense was great based on his juvenile delinquency record and school record; 2) that the offense was vicious; and 3) that a reduced or suspended sentence would depreciate the seriousness of the offense.

Our review of ineffective assistance of appellate counsel is the same as outlined for trial counsel. *Thompson v. State*, 793 N.E.2d 1046, 1051 (Ind. Ct. App. 2003) (citing *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)). “Accordingly, a petitioner must first demonstrate that his counsel’s representation fell below professional norms.” *Id.* “Then, the petitioner must demonstrate that his counsel’s errors resulted in prejudice.” *Id.* Again, we must start with the presumption that counsel’s performance was adequate, and we may dismiss an ineffective assistance claim based upon the prejudice prong, without addressing whether counsel’s performance was deficient. *Id.*

Sentencing decisions are within the discretion of the trial court. *Id.* (citing *Price v. State*, 725 N.E.2d 82, 85 (Ind. 2000)). We review the trial court’s findings of aggravators and mitigators for an abuse of discretion. *Id.* A single aggravating factor is sufficient to justify an enhanced sentence. *Id.* (citing *Kilpatrick v. State*, 746 N.E.2d 52, 62 (Ind.

2001)). In addition, the same aggravating factor may be used to enhance a sentence and to order sentences served consecutively. *Id.*

Here, the trial court found Foster's juvenile history to be an aggravator. The pre-sentence investigation report detailed that from a very young age Foster continued to engage in serious criminal conduct. Specifically, at age nine, Foster and his brother stole merchandise from Target. *R.* at 211. At age eleven, Foster stole a purse and the money therein. *Id.* At age twelve, he broke and entered a home, stole items, and ransacked the home. *Id.* At thirteen, Foster and his brother stole a vehicle and fled from police. *Id.* at 212. Shortly after Foster's arrest, the police recovered a loaded .22 caliber semi-automatic handgun with the safety off inside the vehicle. *Id.* The trial court was permitted to use this criminal history to enhance Foster's sentence, and Foster has failed to show that counsel's failure to challenge the trial court's use of aggravators and mitigators resulted in prejudice.

IV. *Brady* Violation

Foster finally contends that the prosecutor denied him possible exculpatory and impeachment evidence when it did not disclose the police interview of Nicholas Broadus in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963).

Brady "established that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Saylor v. State*, 765 N.E.2d 535, (Ind. 2002), *reh'g granted and rev'd on other grounds*. The evidence is considered "material" if there is a reasonable probability that had it been

disclosed to the defense, the verdict would be different. *Id.* “A ‘reasonable probability’ is a ‘probability sufficient to undermine confidence in the outcome.’” *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). To establish a *Brady* violation, Foster must show that the State suppressed material evidence that was favorable to his defense and that undermines our confidence in the jury’s verdict. *Id.* (citing *Denney v. State*, 695 N.E.2d 90, 94 (Ind. 1998)).

Here, the interviewing detective testified that the investigation in this case took a month and that he interviewed in excess of fifty possible witnesses. While Broadus was one of those interviewed, there was no evidence before the Court that he was ever a suspect and no evidence that Broadus’s identity would help or was kept from the defense. As such, there was no *Brady* violation.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.